IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-575

SOUTHERN RAILWAY CO.

v.

SEABOARD ALLIED MILLING CORP.

NO. 78-597

INTERSTATE COMMERCE COMMISSION

v.

SEABOARD ALLIED MILLING CORP.

NO. 78-604

SEABOARD COAST LINE RAILROAD CO.

v.

SEABOARD ALLIED MILLING CORP.

On Writ of Certiorari to the
United States Court of Appeals Eighth Circuit

AMICUS CURIAE BRIEF
OF
POTOMAC ELECTRIC POWER COMPANY, ET AL.

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CONSENT TO AMICUS CURIAE BRIEF

Pursuant to the provisions of Rule 42.2 the written consent of the parties has been obtained to the filing of this *amicus curiae* brief in support of respondents. The original executed consents have been simultaneously filed with the Court.

INTEREST OF AMICUS CURIAE PARTIES

Potomac Electric Power Company, Arkansas Power & Light Company, Alabama Power Company, Georgia

Power Company, and Gulf Power Company are each electric utility operating companies. System Fuels, Inc. is the fuel procurement subsidiary of the Middle South Utilities System of which Arkansas Power & Light Company is one of the operating companies. Southern Company Services, Inc., similarly, is the fuel procurement subsidiary of the Southern Electric System which includes Alabama Power Company, Georgia Power Company, and Gulf Power Company.

Each of the above-named *amici* is a petitioner in various pending actions seeking review of the order (or, in one instance, orders) of the Interstate Commerce Commission (ICC) in Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide—8 percent*, entered December 11 and December 14, 1978, respectively, insofar as the ICC therein declind to suspend and/or investigate railroad tariffs effecting substantial general increases in the freight rates on bituminous coal moving to electric utilities.[1] In each of those proceedings an issue has been, or will be, raised as to the power of the courts to review the involved ICC orders.

[1] No. 78-2265, *Potomac Electric Power Company* v. *United States of America and Interstate Commerce Commission*, filed December 14, 1978, United States Court of Appeals for the District of Columbia Circuit.

No. 78-3760, *System Fuels, Inc. and Arkansas Power & Light Company* v. *United States of America and Interstate Commerce Commission*, filed December 14, 1978, United States Court of Appeals for the Fifth Circuit.

No. 79-1327, *Alabama Power Company, Georgia Power Company, Gulf Power Company and Southern Company Services, Inc.* v. *United States of America and Interstate Commerce Commission*, filed February 7, 1979, United States Court of Appeals for the Fifth Circuit.

In the first filed of those proceedings, the *PEPCO* case, No. 78-2265, *Potomac Electric Power Company* v. *United States of America and Interstate Commerce Commission*, the United States Court of Appeals for the District of Columbia Circuit entered an order on January 16, 1979, on its own motion holding further action in abeyance pending the decision of this Court in No. 78-604. By its ensuing order of February 21, 1979, the Court similarly held in abeyance other proceedings therein consolidated with the *PEPCO* case.

As urged by the ICC, the United States Court of Appeals for the Fifth Circuit currently has a motion pending likewise to hold in abeyance the System Fuels, Inc. proceeding. Because of the question of reviewability of ICC orders presented in the above cases, these *amici* have a direct and recognized interest in the questions here before the Court.

Although the factual situation existing in the instant case poses a much more limited question of review than in the three referenced proceedings, the legal issues are closely related. In each of these proceedings, the ICC opted for a very formal process and the Commission itself rendered a written decision, rather than delegating authority to an employee board, as is habitually done. The general question of the scope of judicial review is a recurring problem, and a definitive discussion has never been made by this Court. *Amici*, therefore, will examine the general issue raised with respect to reviewability of administrative orders, and leave to the other parties a discussion of the factual issues unique to this case.

STATUTES INVOLVED

Sections 10103, 10324, 10327, 10704, 10707, and 10709 (49 U.S.C. 10103, 10324, 10327, 10704, 10707, and 10709 of the Interstate Commerce Act as recodified by Public Law 95-473, 92 Stat. 1337, approved October 17, 1978, are set forth in Appendix A hereto,[2] as are former sections 13(1), 15(6), 15(8), 17(9), and 22(1) [formerly 49 U.S.C. 13(1), 15(6), 15(8), 17(9), and 22(1)].

STATEMENT: RESPONSIVE COMMENTS RE THE STATUTORY FRAMEWORK

Petitioners base their contention that no judicial review of investigation and suspension orders is allowable on the assertion that the ICC's procedures upon protest of a tariff filing are inevitably expedited, informal and abbreviated and, thus, inappropriate for judicial review. This is not invariably the case, however, and even when it is, should not be made the basis for depriving a shipper of judicial review. The ICC refers on brief to the "crushing burden" of 52,000 tariffs in one year (ICC Brief, p. 56), but these are simply tariffs filed which require no action by the ICC other than cursory review for compliance with rules respecting *form*. It is only those tariffs that are protested which require any substantive review or consideration.

The ICC's statement on brief that it has delegated

[2] Reference is made to the recodified act rather than to the original provisions of the Interstate Commerce Act to which the Court below referred because of the manifest clarification of relevant legislative intent shown therein.

its authority to determine whether to investigate and suspend proposed railroad rate changes to its Suspension and Fourth Section Board (ICC Brief, p. 55) likewise conveys the misleading impression that all such determinations are delegated to this employee board. In fact, the Commission itself makes this determination where the proposed rates will have a substantial public impact, as in general rate increases or even an increase by one railroad in all of its rates on one commodity.[3] The order of the ICC in No. 36663 here involved (A. 286) was a decision of the entire Commission which incorporated a discussion and rationalization of the evidence presented by both carriers and protestants.

The most recent general increase proceeding, Ex Parte No. 357, as to which these *amici* have pending petitions for review, is the clearest refutation of the effort of petitioners on brief to depict ICC action upon protested rates as the cursory exercise of expert judgment by an employee board "made without a formal record of any sort" (ICC Brief, pp. 54-58). In Ex Parte 357, as in other recent general increase cases, the ICC prescribed a procedural timetable, albeit on an expedited basis. The petitioning railroads submitted 18-1/2 pounds—literally—of supporting evidence and numerous comprehensive statements, which contained cost evidence and legal argument, were filed in opposition. Extensive replies were filed by the railroads. The

[3] *See, e.g.*, Ex Parte No. 349, *Increased Freight Rates and Charges, 1978, Nationwide* (order dated June 7, 1978); Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide—8 Percent* (order dated December 11, 1978) and No. 37063, *Increased Rates on Coal, Louisville & Nashville Railroad, October 31, 1978.*

entire Commission heard oral argument and the order authorizing the proposed increased rates to be made effective and declining to suspend and/or investigate was entered by the Commission, not by an employee board.[4] Moreover, this order undertook some review of the evidence and rationalization of the grounds for decision. Clearly, such an order cannot be said to be either perfunctory or unsuited to judicial review.[5]

Whether Commission action upon a protested tariff is a preemptory disposition by an employee board or an articulated decision by the entire Commission predicated upon a comprehensive record and oral argument, there are only three possible results. The ICC can decline to either suspend or investigate, whereupon that proceeding is concluded and the tariff becomes immediately effective as proposed. Alternatively, the ICC can refuse to suspend the tariff, but institute a formal

[4] The Suspension and Fourth Section Board does not even retain the administrative responsibility for investigation and suspension proceedings in which the full Commission itself decides to make a determination; rather, this yearly handful of important cases is handled administratively by the ICC's Office of Proceedings.

[5] In the instant case, the Southern Freight Association filed a justification statement which accompanied the proposed tariff changes (A., pp. 25-96). Numerous complaints, protests, and petitions for suspension and investigation were timely filed with the ICC (A., pp. 99-241), and a petition for rejection of the tariffs was received (A., pp. 242-248). Southern Freight Association filed a reply prior to the effective date of the new tariffs (A., pp. 249-279), and the full Commission, after consideration of this substantial written record, issued a written order refusing to suspend or investigate the proposed changes (A., pp. 286-291).

investigation proceeding, or do both, suspend and investigate. Under either of the latter alternatives, by way of contrast to an order refusing to suspend or investigate, the matter is not finally resolved until subsequent order of the Commission. In these instances reviewability is therefore precluded by lack of a final order, not by any legislative purpose respecting the Commission's specific suspension or investigation powers.

QUESTION PRESENTED

Is an order of the ICC which denies the protests of affected shippers and refuses to suspend and/or investigate a proposed railroad tariff publishing increased freight rates, thereby permitting such rates to become effective, judicially reviewable?

SUMMARY OF ARGUMENT

The respective U.S. Courts of Appeals for the District of Columbia and Fifth Circuits, by entering or proposing orders holding in abeyance pending proceedings involving orders of the ICC refusing to suspend or investigate a railroad general increase tariff until decision of the Court in this case, have impliedly recognized that there are here presented issues of public import that transcend the particular, somewhat unique, factual context in which those questions are presented. This brief, accordingly, will not undertake to address the merits of the controversy below or the factual or legal circumstances in which it arose. Rather, the brief of these *amici* will be confined to the general principles which it is believed should govern judicial review

of ICC orders which decline either to suspend and investigate or to investigate, without suspension, a proposed railroad tariff.[6]

Characterization of such orders as "discretionary" should not be permitted to obscure the fact that petitioners here seek to immunize the ICC from judicial scrutiny as to final orders that determine the rates to be paid by the shipping public. A shipper filing a rate complaint, the "in futuro" potential remedy suggested by petitioners, is equally subject to exercise of agency "discretion" as to relief, yet orders in such proceedings are conceded to be reviewable for abuse of discretion. This Court, therefore, is presented by petitioners with an asserted "statutory plan" in which a shipper can obtain court review of an ICC order denying a few dollars in reparations, but a shipper—or all shippers combined—are said to be deprived of judicial review of an order making effective a general railroad rate increase of $1.7 billion a year.[7]

The orders of the ICC which refuse to suspend or investigate a proposed railroad tariff inevitably terminate that particular agency proceeding. Contrary to

[6] This brief will concentrate on the limited situation, reflected in the instant case, in which the entire Interstate Commerce Commission determines that a suspension or investigation is not appropriate rather than the "normal" situation in which an employee board informally decides the issue on the basis of the limited data at its disposal.

[7] In the last general increase, Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide—8 Percent*, which is the proceeding involved in the pending petitions for review of these *amici*, the railroads themselves estimated the revenue effect of their proposal at $1.725 billion annually.

the representations of petitioners, that order is no less final because an aggrieved party can elect to begin another agency proceeding by filing a complaint. On this theory there could never be a "final" order since there is always available the privilege of seeking further corrective action in a new complaint proceeding. To reverse the roles of shipper and railroad, the carrier can always obtain additional review merely by filing another tariff, including a general increase, if it feels aggrieved by an ICC order prescribing a maximum reasonable rate. Petitioners do not suggest, however, that the latter order is not judicially reviewable.

This Court in *Arrow Transportation Co. v. Southern Ry.* 372 U.S. 658, 664 (1963), in a split decision, undertook to perceive the legislative intent as to review, there admittedly ill-defined. *Arrow* held that an ICC order declining to suspend is not reviewable, thus precluding the courts from enjoining the effectiveness of a proposed tariff, but that holding has been subsequently eroded. The principle is now established that such an order is in fact reviewable,[8] the only question being as to the circumstances under which judicial review is authorized.

The Court need no longer attempt to discern the obscure legislative intent. The recodification of the Interstate Commerce Act expressly preserves all available statutory and common law remedies. No exception has been carved out for ICC orders refusing to suspend and/or investigate tariffs. As the recodification is not intended to alter substantive law, it is fair to con-

[8] See, e.g., *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, (1978).

clude that the Congress takes a different view of the exclusivity of the powers delegated to the ICC than did this Court in *Arrow* and subsequent related proceedings.

The several petitioners, as well as the Solicitor General, in their respective briefs, have blended together distinct concepts which should properly be separately considered. The power of the courts to review is an issue separate and distinct from the issues of agency discretion, exhaustion of administrative remedies and injunctive relief although, of course, a petition for review of an ICC order may pose all of these distinct questions.

The position of these *amici* on these issues should be made unmistakably clear. They agree with the Solicitor General that an ICC order declining to investigate a proposed tariff has not been declared "off limits" to the Courts by Congress, although they cannot agree with the further conclusion of the Solicitor General that this acknowledged remedy is not immediately available. The *amici* agree further with the petitioners that the power of the ICC to suspend and/or investigate a tariff is discretionary but submit that this does not preclude judicial review. The power of the ICC to prescribe a reduced rate or award reparations upon filing of a complaint—which all petitioners urge as the ultimate, admittedly reviewable, remedy—is likewise discretionary. As the Solicitor General has correctly observed, review extends to an abuse of discretion (Solicitor General Brief, p. 33).

These *amici* also agree that administrative finality, or stated otherwise, exhaustion of remedies, is a neces-

sary prerequisite to judicial review of any agency action. Manifestly, where the ICC has instituted an investigation, whether or not accompanied by suspension of the effective date of the tariff, the proceeding is still pending and review would be premature. In the contrary situation, however, which is here before the Court, where the ICC has declined to institute such an investigation, the proceeding is at an end. The fact that a right exisits to begin some other proceeding, such as by the filing of a complaint, does not render the protest proceeding any less administratively final. That right to file a complaint exists independently of the protest proceeding and is not barred even where the involved rates have already been made the subject of an investigation. Carrying the ICC's argument to its logical conclusion would lead to a situation in which no decision would be "final," because another complaint could always be filed.[9] The ICC and the Solicitor General both recognize, however, that complaint decisions by the Commission are immediately reviewable.

The Court need not here deal with the question of injunctive relief where the ICC has declined to suspend a tariff, which was the precise issue in the *Arrow* case. Here again, however, it is submitted that injunctive relief and reviewability should not be confused. If, as urged by petitioners, there exist compelling reasons why the Courts should not interfere by enjoining the effective date of a tariff which the ICC has declined to suspend, the order is no less reviewable even though

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[9] Likewise, a carrier can immediately institute another proceeding by filing a new tariff if it feels aggrieved by an ICC maximum rate order in a complaint proceeding, yet the ICC's maximum rate order is admittedly both final and reviewable.

under recognized principles of injunctive relief, as summarized, for example, in *Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), petitioners may have failed to justify issuance of a stay. Interim injunctive relief is a separate issue which should be approached on the same basis whatever the nature of the proceeding under review.

ARGUMENT

I. Preliminary Emphasis Should Be Given To The Recodification Of The Interstate Commerce Act To Deduce Legislative Intent.

There is no contention by any of the parties urging reversal of the judgment below that Congress has expressly deprived the Courts of jurisdiction to review an ICC order refusing to institute a rate investigation. The ICC (ICC Brief, pp. 21-22) acknowledges that "[n]o statute expressly prohibits judicial review of a no-investigation decision" and would have the Court look to the "entire legislative scheme" to determine the Congressional intent. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). The Solicitor General goes even further and affirmatively concludes that "nothing in the structure of the Interstate Commerce Act suggests that judicial review would interfere with the achievement of the legislature's objectives." (Solicitor General Brief, p. 10). It is here submitted that not only is there no discernible legislative purpose to preclude review but, moreover, very recent reaffirmation of the legislative purpose to encompass review of no-investigation orders within the review powers of the Courts.

The cornerstone of the citations urged by petitioners in support of their argument that ICC "no suspend and/or no investigate" orders are not reviewable is the 1963 decision of this Court in *Arrow, supra.* All of the cited ensuing decisions track from *Arrow* and reflect implementation, amplification, interpretation or modification of that decision.[10] It was the basic thrust of the majority decision in *Arrow* to undertake to determine a legislative intent that admittedly was not then clearly revealed. The Court there acknowledged the absence of clear-cut legislative purpose, stating that:

> "It cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates" (372 U.S. at 664).

The separate opinion of Mr. Justice Clark, joined by Chief Justice Warren and Mr. Justice Black, agreed with the *amicus curiae* brief filed by the United States urging the existence of judicial injunctive power. Mr. Justice Clark went on there to observe:

> "whenever Congress wanted to oust the jurisdiction of the courts it not only knew how to do it but did so in no uncertain terms" (372 U.S. at 679).

Petitioners here impliedly suggest that the Court is in no better position today than in *Arrow* to determine

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[10] See, e.g., *Alphalt Roofing Manufacturer's Ass'n* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977); *Port of N.Y. Authority* v. *United States*, 451 F.2d 783 (2nd Cir. 1971); *Nat'l Industrial Traffic League* v. *United States*, 287 F. Supp. 129 (D. D.C. 1968); *aff'd. mem.*, 393 U.S. 535 (1969).

the legislative purpose. The assistance in this endeavor that can be derived from legislative enactments subsequent to *Arrow* seems largely to have been ignored. Frequent reference is made to the 4-R Act,[11] which undertook not only to expedite ICC consideration of rail matters but to assist in improving railroad revenues. The significance of the 4-R Act in this proceeding, however, is to be found in the fact that, notwithstanding the stated objectives of expedited handling and railroad revitalization, Congress did not there take any action to curtail the review jurisdiction of the Courts.

It would seem most logical in any inquiry into the legislative purpose to look to the most recent legislative enactment. This is the recodification of the Interstate Commerce Act in Public Law 95-473, 92 Stat. 1337, approved October 17, 1978. Petitioners have alluded to this recodification on brief but put it to one side with the statement that no substantive change was intended.[12] It is precisely because the recodification made no substantive changes that the clarifying language of the recodification is even more significant. As was stated in a very recent decision, ". . . the new language may serve as a guide to the meaning of the original Act." No. 77-1974, *Purolator Courier Corp.* v. *ICC and United States*, decided February 1, 1979 (D.C. Cir. 1979), p. 4, n. 5. Simply stated, the recodified Act establishes that the Congress has a different view of the legislative intent as to reviewability than did the majority of this

[11] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31.

[12] Seaboard Brief, p. 3; Solicitor General Brief, pp. 2-3; Southern Brief, p.2, n. 2.

Court in *Arrow*. No substantive change has been made in the legislative intent by the recodification,[13] which now clearly establishes that the *Arrow* majority misconstrued the legislative purpose which was somewhat unclear prior to the recodification.

Before turning to the particular provisions of the recodified Act deemed to be most relevant to this inquiry, it should be emphasized that the recodified language is intended to be a simpler and clearer exposition of the legislative intent than the original language, a fact which standing alone would suggest that a search for the "entire legislative scheme" properly focuses upon the recodified language. The purpose of the recodification is set forth in the following prefatory "statement" from the House Report:

> "Purpose.—The purpose of the bill is to restate in comprehensive form, without substantive change, the Interstate Commerce Act and related laws, and to enact those laws as subtitle IV of title 49, United States Code. In the restatement, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete statutes have been eliminated. This bill is part of the program of the Office of the Law Revision Counsel of the House of Representatives to prepare and submit to this Committee, for enactment into positive law, all titles of the United State Code. (House Report No. 95-1395, pp. 4-5)

Most persuasive of the legislative purpose is new

[13] Section 3(a) of Pub. L. 95-473, 92 Stat. 1466, states that the recodification "may not be construed as making a substantive change in the laws replaced."

Section 10103 (49 U.S.C. 10103) which states categorically that "[t]he remedies provided under this subtitle are in addition to remedies existing under another law or at common law." Previously the counterpart language of the Act was buried in former Section 22 (formerly 49 U.S.C. 22). Now it appears as a separate section immediately following the definitions in the recodification. The accompanying legislative history of Section 10103 explains that:

> "The section consolidates and restates the source provisions for clarity. The word 'subtitle' is substituted for 'chapter' in 49:22(1) to conform to the revised title. The words 'and nothing contained in this chapter shall in any way abridge or alter the remedies now existing' in 49:22(1) are omitted as unnecessary and as being included in the words 'are in addition to.' The word 'law' is substituted for 'statute' in 49:22(1) for consistency." (House Report No. 95-1395, p. 22)

Equally pertinent is 49 U.S.C. 10324, containing general provisions relating to "Commission action" which derive from several former provisions of the Act. That section provides in pertinent part that "a Court of competent jurisdiction may suspend or set aside any such act." The subject of reviewability is pursued in the immediately following sections of the recodified act. 49 U.S.C. 10325 relates to "judicial review—nonrail proceedings" but it contains no specific reference to action taken by the ICC with respect to a nonrail tariff.

49 U.S.C. 10327, designated "Commission action and appellate procedure in rail carrier proceedings," also refers in general terms to judicial review. As there provided in Subparagraph (a), Section 10327 applies to all matters involving a rail carrier, and is superseded by other sections only to the extent "that they are inconsistent with the provisions of this section related to deadlines." Subparagraph (i) of Section 10327 provides in pertinent part ". . . a civil action to enforce, enjoin, suspend or set aside the action may be filed after that date," i.e. the date of service of the ICC order. This is derived from former Section 17(9) [formerly 49 U.S.C. 17(9)].

Possibly the most compelling affirmative indication of legislative purpose is to be found in new Section 10709 (49 U.S.C. 10709), which emanates from the 4-R Act of 1976 and is thus something more than a recodification in more simplistic language of earlier law. This section deals with the new 4-R Act concept of market dominance which is there made the threshold determinant of ICC maximum rate jurisdiction. Subparagraph (a) of Section 10709 [49 U.S.C. 10709 (a)] provides in pertinent part:

> "A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction."

Here there is an express reference to judicial review with no suggestion that it await or be precluded by the shipper's option to file a complaint. Recognizing that an ICC no-investigate order could very well be grounded upon the determination "that the carrier does not have market dominance"—where the agency chooses to state any rationale whatsoever—the Congress has expressly provided that such an order may

be "set aside by a court of competent jurisdiction." Moreover, there is no legislative suggestion or implication that the Court await final resolution of a complaint proceeding as suggested by the Solicitor General[14] before exercising its powers. Neither is there here any indication that the Congress considered that it was carving out a special exception in declaring the determination of market dominance to be reviewable. The conclusion is inescapable, therefore, that the Congress has always viewed all ICC no-investigate orders, whether based upon the jurisdictional issue of market dominance or upon the merits, as immediately reviewable by the Courts.

By way of contrast to the provisions of general applicability in the recodified Act, now Subtitle IV, Section 10707 (49 U.S. 10707), which is the specific source of the ICC's power to investigate and/or suspend a rate proposal, contains no language that is in any way even suggestive of a Congressional purpose to exempt ICC action under this section from judicial review. The same is true of Section 10708 (49 U.S.C. 10708) which confers the same power of suspension or investigation in nonrail matters as does Section 10707 for rail rates. Petitioners' arguments that the Congressional purpose uniquely to withhold judicial review from ICC tariff actions may be inferred from time restraints and permissive language will be separately discussed. (*Infra*, pp. 21-23) It will be seen that the Act is replete with permissive language and additionally contains other time restraints in circumstances where it has never been suggested that the courts are deprived of jurisdiction.

[14] Solicitor General Brief, p. 15.

Petitioners place great emphasis upon the discretionary language of former Section 15(8) [formerly 49 U.S.C. 15(8)] in urging that judicial review must be assumed to be incompatible with administrative discretion. If that is the case, however, then the Courts are deprived of jurisdiction to review ICC actions of a type that have invariably been subject to review.

It is conceded that Section 10707 provides that the ICC "may" suspend or investigate just as did former Section 15(8). It is also clear that Congress recognizes the difference between "may" and "shall." Indeed, the explanation of the changes in the recodification makes this distinction expressly clear stating that:

> "The word 'shall' is used in the mandatory and imperative sense. The word 'may' is used in the permissive and discretionary sense, as 'is permitted to' and 'is authorized to'. The words 'may not' are used in a prohibitory sense, as 'is not authorized to' and 'is not permitted to'. The words 'person may not' mean that no individual is required, authorized, or permitted to do the act." (House Report No. 95-1395, p. 9)

But the frequent grants of permissive or discretionary powers to the ICC reveal no Congressional purpose to deprive the Courts of jurisdiction to review an agency abuse of discretion.

Throughout their respective briefs, petitioners sharply contrast former Section 15(8) with former Section 13(1) [49 U.S.C. 13(1)], urging that the filing of a complaint under the latter section constitutes the appropriate remedy for a shipper aggrieved by the

effectiveness of a rate increase.[15] Former Section 13(1) is now 49 J.S.C. 11701(b). The standards for the disposition of a shipper complaint against a rail rate are found in 49 U.S.C. 10704. That recodified provision provides in substance that when the ICC has found a rail rate to be unlawful it "may" prescribe the lawful rate and it "may order the carrier to stop the violation." [49 U.S.C. 10704(a)(1)]

Thus, Congress has preserved ICC discretion in applying the remedy even where the agency, responsive to its duty to investigate a shipper complaint, *has found a rate to be unlawful.* No party has suggested, however, that a shipper may not seek judicial review of an ICC order which, in the exercise of its discretion, declines to prescribe a reasonable rate or enter a cease and desist order where a violation has been found. Thus, the very complaint procedure so frequently stressed by the petitioners itself demonstrates that ICC discretion is reviewable. If the courts were to review only the actions of the ICC in which the result or nature of the order is *mandatory*, rather than permissive, there would be little necessity for court review.

Insofar as time restraints are concerned, the argument that a Congressional purpose to exempt tariff orders from judicial review is to be inferred from time limitations is also refuted by the Act. Section 10705 (49 U.S.C. 10705) of the recodified Act is illustrative. This section deals with divisions of joint rates between rail carriers and, pursuant to the 4-R Act, provides time limitations for the disposition of these in-

[15] ICC Brief, pp. 23-33; Seaboard Brief, pp. 24-32; Solicitor General Brief, pp. 15-19; Southern Brief, pp. 13-20.

ternecine controversies. Rail division cases arising under former Section 15(6) [formerly 49 U.S.C. 15(6)] have frequently been subjected to judicial review with no suggestion of lack of jurisdiction [See *e.g.*, *Aberdeen & Rockfish R. Co.* v. *U.S.*, 270 F. Supp. 695 (D.C. La. 1967); *aff'd* 393 U.S. 87; *reh. den.* 393 U.S. 1124]. This same recodified section also provides that the ICC "may require a rail carrier to include in a through route substantially less than the entire length of its railroads. . . ." No rail carrier has heretofore ever suggested that it could not seek judicial review of an ICC order requiring that it "shorthaul itself" [See, *e.g.*, *St. Louis Southwestern Ry. Co.* v. *U.S.*, 245 U.S. 136 (1917)].

II. Grant Of Discretion Does Not Preclude Judicial Review For Abuse of Discretion

The ICC and railroad petitioners have placed great emphasis upon the discretionary nature of the former's powers to suspend and/or investigate a proposed rate.[16] Care must be taken to distinguish the issue of reviewability from that of the nature of the agency powers involved. The grant of discretion to the ICC to investigate a proposed tariff is in no sense incompatible with judicial review of the Commission's order exercising that discretion. The preceding discussion of the various powers granted to the ICC[17], which is by no means complete, demonstrates that the Commission has discretion in numerous areas, including the granting of relief upon a shipper complaint, that is

[16] ICC Brief, pp. 17-23; Seaboard Brief, pp. 12-19; Southern Brief, pp. 20-28.

[17] *Supra*, pp. 16-21.

recognized to be amenable to judicial review. The discretionary aspect of the order presently under judicial scrutiny simply renders the burden upon the party attacking the order somewhat more onerous than would be the case where agency action is mandatory rather than permissive.

The Solicitor General addresses the issue of ICC discretion fully and soundly (Solicitor General Brief, pp. 32-34). The Solicitor General there recognizes the significant distinction between broad discretion and limitless discretion and concludes that "... the fact that judicial review may be necessary to protect statutory rights in only a few cases is not a reason for concluding that review is not available at all" (*Id.* p. 33). Indeed, the United States hypothesizes certain extreme situations in which it suggests Commission failure to investigate a proposed rate change would clearly constitute an abuse of discretion (*Id.* p. 34).

The fact that the Congress has committed a matter to agency discretion does not foreclose Court consideration of an alleged abuse of that discretion. *Overseas Media Corp.* v. *McNamara*, 385 F.2d 308, 128 U.S. App. D.C. 48. (1967); see also *Velasco* v. *Immigration and Naturalization Service*, 386 F.2d 283 (7th Cir. 1967); *cert. den.*, 393 U.S. 867. Significantly, it may be an abuse of discretion for the ICC to act in a particular tariff matter upon a fragmentary record without undertaking to collect the necessary facts. *Xytex Corp.* v. *Schliemann*, 382 F. Supp. 50 (D.C. Colo. 1974).

Abbott Labs, 387 U.S. at 140-141, holds in general that review should be allowed unless a persuasive argument can be made that Congress intended to deny re-

viewability. The decision noted that the Court had often cited the Administrative Procedure Acts' "generous review provisions" in support of the presumption of judicial review. *Atchison T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) finds that delegation of authority to the Commission is not "unbounded" and that the "limited scope" of review includes decisions that are unsupported by evidence, made without a hearing, exceed constitutional limits, or amount to an abuse of power. *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481 (1918) is cited, as is 5 U.S.C.A. 706(2). In *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-639, n. 17 (1978), the courts have jurisdiction to review suspension orders of the ICC for the limited purpose of determining whether the Commission has overstepped the bounds of its authority. *Council of Forest Industries of British Columbia* v. *ICC*, 570 F.2d 1056, 1062 (7th Cir. 1978) allows reviewability of general rate proceedings under various circumstances. Admittedly, review of discretionary action is narrow, but the mere grant of discretion to an agency, standing alone, does not preclude judicial review.

III. The Doctrines of Ripeness and Exhaustion of Remedies Have Been Misapplied by Petitioners

The Solicitor General (Solicitor General Brief, pp. 10-19) argues that review of issues raised in the protest should be deferred until the completion of the complaint process, and bases this contention on the doctrines of ripeness and exhaustion of administrative remedies. An analysis of these concepts, however, shows that the goals of these legal principles would be better served by immediate judicial review when certain legal issues are raised by protestants.

The doctrine of ripeness is grounded in the premise that courts should not give advisory opinions, and that review should be based on a complete and clear record. The question to be decided by the court should be a legal one, the answer to which may have an immediate effect on the parties involved. The issues should not be remote, speculative, or hypothetical. Much of the prevailing case law on this question comes from the *Abbott Labs* triology of cases.[18] The *Abbott Labs* requirement is that ripeness for reviewability should be based on the hardship to the parties of withholding review and on the fitness of the issues for review. Fitness for review consists of the presence of a legal issue and finality of the administrative process. 387 U.S. at 149. As this Court noted, the basic rationale for ripeness:

> ". . . is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties."
> 387 U.S. at 148-149

Stated another way, ripeness requires that rights and obligations be determined and that legal consequences flow.[19]

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[18] *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

[19] *Port of Boston M.T. Ass'n* v. *Rederiaktiebolaget Tr.*, 400 U.S. 62, 71 (1970).

The hardships incumbent on parties when an investigation and/or suspension is denied would vary from case to case. As a general rule, however, substantial amounts of time, money, and effort would be wasted by all parties if immediate review of certain legal issues is denied. Under the Solicitor General's proposal, for instance, a complaint is made, and if the new rates are found to be just and reasonable after a substantial record is established, court review of both the protest and complaint would begin. Then, if the reviewing court determined that in the original protest proceeding the ICC had, for instance, failed to develop an adequate record, abused its discretion, or changed a prior position without articulating reasons therefor the proceeding would have to be remanded back to the ICC for additional action on the protest. The entire complaint proceeding would have become a futile, and expensive exercise.

As the entire Commission has already determined that the tariff changes should not be investigated and/or suspended,[20] there is little likelihood that this position will change in a subsequent complaint proceeding. In keeping with the Court's findings in *Chicago* v. *Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 84 (1958), immediate review is appropriate. The courts will never be in a better position to review the legal issues raised following a protest than immediately thereafter. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620, 2635 (1978).

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[20] This was not the preliminary assessment of reasonableness commonly made in suspension orders, [*United States* v. *SCRAP*, 412 U.S. 669, 692, n. 16 (1973)], but rather was a formal determination made by the full Commission as the basis of a substantial written record.

The *Abbott Labs* requirement that a legal issue be present for review to be granted is clearly met in this instance. Abuse of discretion, violation of constitutional, statutory, or case law, and arbitrary and capricious action, among others, are all legal issues that ultimately must be decided by a court.[21] The question thus becomes one of determining if the administrative record and the legal issues are adequately final to justify immediate review.

Abbott Labs adopts a "pragmatic" and "flexible" approach to finality. 387 U.S. at 149, 150. In this instance, the administrative process would not be interrupted by immediate review because the protest process ends with the ICC's refusal to investigate and/or suspend. Any complaint proceeding would have a new docket number, be decided by different persons, and would shift the burden of proof to the complainant. The issues in that complaint proceeding would center on the justness and reasonableness of the rate challenged and there is no guarantee that the appropriate issues would be considered if judicial review is delayed. The particular issue raised at the protest concerning the Commission's actions to the protest might be lost in the complaint proceeding. For instance, one might seek judicial review of a general increase on the grounds that overall revenue need had not been proven; yet overall revenue need would not be an issue in the justness and reasonableness of an individual rate when attacked in a complaint proceeding.

The instant protest proceeding did not end in a ruling made by a subordinate official, nor is it tentative

[21] See 5 U.S.C. 551, 706.

or informal, and conformity with the ruling is expected. The instant decision is not one for which review is precluded under 5 U.S.C. 557, but rather is a definitive, formal ruling by the entire Commission, made after development of a substantial written record, with which the agency expects compliance.[22]

The practical result of a refusal to suspend and/or investigate is that the Commission has ended its deliberations on issues of the type focused on in this case and in others involving the Commission's abuse of discretion or failure to follow the mandates of the law in the protest proceeding. The record is clear as to what actions the Commission has taken. The Commission's formal finding is ripe for review of legal issues that arise in a concrete form from the protest proceeding. The Commission's action is not tentative, and the legal questions presented are not hypothetical.[23] As the decision was made by the full Commission on the basis of a substantial record, there is little reason to think that the finding would eventually be changed or abandoned after the complaint process. Even though a new administrative complaint proceeding could be instituted, the findings are sufficiently final to warrant immediate review because of the concrete nature of the record and the clarity of the legal issues raised.[24]

[22] In *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), review was allowed even though other agency actions could be taken. See also, *National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F.2d 689 (D.C. Cir. 1971).

[23] *Id.*, 443 F.2d at 700-703.

[24] See *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 590-592 (D.C. Cir. 1971). But see, *Nor-Am Agricultural Products, Inc.* v. *Hardin*, 435 F.2d 1151, 1155-59 (9th Cir. 1970) *(en banc)*.

In *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162, 163, ripeness was not found because the regulation provided that the Commission "may" suspend certification of color additives. As the agency had not yet exercised its discretion, the case was not ripe because the Court could not be sure how that discretion would be exercised, and in what context. In the instant case, the discretion given by Congress to the Commission has already been exercised, and the impact on protestants is immediate.

That the Commission's refusal to investigate and/or suspend is a final action ripe for review is shown by the shifting of the burden of proof from the railroads, in the protest proceeding, to the shippers in the complaint proceeding. The well decided principle is that the burden of proof, the ultimate risk of non-persuasion, should never change in a proceeding.[25] This shifting of the burden of proof by the Commission signals the end of one proceeding. The mere fact another one may be instituted in the future does not in any way lessen the finality of the protest decision rendered by the full Commission after examination of a substantial written record. Review is allowable and appropriate under 5 U.S.C. 704 and 28 U.S.C. 2342(5) at this time.

Petitioners on brief, notably the railroad petitioners, also invoke the doctrine of exhaustion of remedies as allegedly precluding judicial review of a no-investigate order until after a complaint proceeding has been finally litigated. These *amici* do not dispute the basic

[25] See, *e.g.*, *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941). 9 *Wigmore on Evidence*, 3rd ed (1940), § 2489, pp. 285, 286.

principle as, for example, stated by Seaboard Coast Line Railroad Company, *et al.* that "[e]xhaustion of administrative remedies is a condition precedent to judicial review" (Seaboard Brief, p. 27). This doctrine is simply a common sense application of the traditional alternative concepts of finality, prematurity, or ripeness. Manifestly, it would be wasteful and exceedingly premature for a court to review agency action in a particular proceeding until the agency has completed its deliberations.

Southern Railway Company (Southern Brief, p. 13) quotes from *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972), where this Court said:

> "(t)he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies".

Predicated upon that decision, Southern Railway Company states quite accurately:

> "The familiar reasons for the doctrine include conservation of judicial resources, the opportunity to develop a more complete record, and the desirability of avoiding interference with the administrative process and of invoking administrative expertise to the fullest extent possible". (Southern Brief, p. 13).

Simply stated, exhaustion of remedies means that the Courts should stay their hand until the agency has completed its activities in a given proceeding. Where

the ICC has refused, after considering protests and replies to protests, to suspend or investigate a proposed tariff, it has completed the administrative process.[26] To paraphrase Southern's statement on brief the "opportunity to develop a more complete record" is foreclosed with the Commission's refusal to investigate. There can be no "interference with the administrative process" by judicial review because the administrative process has been concluded.[27] Neither is there any further possibility of "invoking administrative expertise to the fullest extent possible" where the ICC declines to institute an investigation as the vehicle for the exercise of such expertise.[28] If no investigation is instituted, the administrative process is at an end. There are no further remedies available with respect to the tariff that is the subject matter of that administrative process other than judicial review. On the other hand, if the ICC institutes an investigation, all of the described attributes of the administrative process are ongoing.

It is the thrust of petitioners' argument that administrative remedies have not been exhausted because an aggrieved party may commence another lawsuit as, for example, by filing a complaint. That privilege, however, exists in a wide range of circumstances where no one has ever suggested judicial review to be precluded. For example, to assume the contrary situation, even where there is a pending investigation, neither the railroad nor the shipper is precluded from, in the former instance, proposing or in the latter instance, assailing,

[26] *Supra*, pp. 26, 28.

[27] See *McKart v. United States*, 395 U.S. 185, 194-195 (1969).

[28] *Id.*, at p. 194.

a particular rate even though the remedy available to each through the investigation has not been finally resolved.

To illustrate further, and once again reversing the roles of the parties, if a shipper pursues the suggested panacea of a complaint proceeding and is successful in persuading the ICC to prescribe a maximum reasonable rate, the involved railroad can seek and obtain judicial review of that ICC order. Under petitioners' exhaustion of remedies doctrine as sought to be applied here, review would be precluded because there is an available administrative remedy. The railroad can file another tariff, increasing the involved rate, and demonstrate the reasonableness of that proposal, even if the matter is placed under investigation. Stated otherwise, if the available remedy is the commencement of another lawsuit, that remedy is always available; but the potential of beginning another lawsuit does not alter the fact that the sought remedy of suspension and/or investigation of a proposed tariff has been fully exhausted with the final order of the ICC denying the protest and declining to investigate the tariff.

Petitioners' argument does not appear convincing in view of the purposes underlying the exhaustion of remedies doctrine. Under *McKart v. United States*, 395 U.S. 185, 199 (1969), review is permitted when the agency proceeding has come to an end. Immediate review is also authorized whenever an agency is acting in excess of its delegated powers or contrary to specific provisions of a statute.[29] In general, the key element in

[29] *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958).

requiring exhaustion of administrative remedies is to assure that there is no judicial interference with administrative expertise or discretion.[30] While exhaustion of remedies is an established doctrine, it is "subject to numerous exceptions."[31] As was pointed out in *G.I. Rights* v. *Calloway*, 518 F.2d 466, 474 (D.C. Cir. 1975), the doctrine should not be applied blindly; rather, the considerations underlying the doctrine should be examined.

In the instant situation, the record is clear and factual[32] and the legal issues are concrete and substantial. As the full Commission has determined that investigation and/or suspension is not appropriate, there is little or no chance that a complaint proceeding would settle the issue[33] and the grievances of protestants would continue. Immediate resort to judicial review might actually lighten the burdens on the administrative process. If, for instance, the outcome of judicial review is that an error was made in the protest proceeding by the Commission, the complaint process might become unnecessary. Certainly, a complaint which had already been heard prior to the court's determination that an error was made during the protest would be a waste of administrative resources. Additionally, if judicial review determines that the Commission made no error during the protest, numerous protestants would probably decide not to file a complaint because of the increased likelihood of failure. If the Commission already had concluded that the rate was just and reasonable and should not be suspended and the Courts had upheld that finding, the lengthy and expensive complaint process would not appear to be an attractive alternative. Under the Solicitor General's proposal, parties would have to complain in all instances in order merely to retain their right to judicial review of the protest. A single immediate judicial review is preferable to the filing of numerous individual complaint proceedings arising from, for instance, a general rate increase. Each individual tariff would be subject to a complaint proceeding. Earlier review would, in all probability, eliminate many of these complaints.

While it generally may be more efficient to go forward with all possible administrative recourse prior to judicial review, the instant situation calls for immediate review. It would be futile to continue the administrative process.[34] For purposes of the Administrative Procedure Act,[35] review should be allowed immediately because there is no higher administrative authority to appeal to. The only recourse is to complain, and there is no agency rule requiring that this entirely new proceeding be undertaken prior to judicial review. The remedy involved in a complaint proceeding is not nearly as effective as that in an investigation following a protest. Indeed, this Court has voiced serious reservations about the efficacy of the complaint proceeding's reparations remedy.[36] In instances

[30] *McKart, supra*, 395 U.S. at 194.

[31] *Id.*, 395 at 193.

[32] *Id.*, 395 at 194.

[33] *Id.*, 395 at 194, 195.

[34] *Ogletree* v. *McNamara*, 449 F.2d 93, 99 (6th Cir. 1971).

[35] 5 U.S.C. 704.

[36] *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 640, n. 18 (1978).

in which the protest proceeding itself is attacked, or in which allegations of statutory or case law violations are alleged, all effective remedies have been exhausted at the end of the protest proceeding, and review should be immediate.

IV. The Suggested Alternative Remedy Of A Complaint Proceeding Can Be Time Consuming And Ineffective And Is Likewise Subject To Exercise Of Commission Discretion

Petitioners portray the alternative remedy of shipper complaint in glowing terms.[37] In actuality, while there is conceded to be such a remedy as a matter of law, as a practical matter it is often more illusory than real and almost inevitably incomplete in the sense of ultimately making a shipper whole for excessive rates on prior shipments.

PEPCO can attest to recent first-hand experience with this remedy. In December, 1974 PEPCO filed a complaint with the ICC,[38] attacking the level of various rail rates on coal to three PEPCO generating stations, which was later the subject of an oral hearing. To briefly state the results, subsequent to the initial decision of an administrative law judge, the ICC, in its order of April 1, 1977, dismissed PEPCO's complaint as to the Penn Central rates, both unit train and trainload. On the other hand, in the same order, it found the trainload rates via the Chessie System lines to be unreasonably high.[39] It did not there prescribe a maximum reasonable rate, however, but reopened the proceeding for receipt of further evidence addressed to that issue. Subsequently, in its order of October 21, 1977,[40] the Commission prescribed a reduced trainload rate via the Chessie System lines to PEPCO's Dickerson Station. Significantly, in that order it denied reparations to PEPCO on past shipments, *even those shipments moving subsequent to the date that the ICC itself had declared the rate to be unlawful.* So much, therefore, for the illusory remedy of reparation.

Moreover, no aspect of the PEPCO complaint proceeding of 1974 is as yet finally resolved. The Chessie System lines petitioned for review of that portion of the order prescribing a reduced trainload rate, and that proceeding is still pending in the United States Court of Appeals for the Fourth Circuit.[41]

PEPCO petitioned for review of that part of the ICC's order which denied relief as to the Penn Central unit train rates. In its decision of August 2, 1978, the U.S. Court of Appeals for the District of Columbia Circuit remanded to the ICC.[42] Rather than issuing a further report consistent with the Court's remand, however, the ICC solicited the views of the parties as to whether new cost evidence should be submitted.[43] Thus,

[37] The remedy is said to be "very broad in scope" (Seaboard Brief, p. 29) and "full and complete" (Southern Brief, p. 13).

[38] No. 36114, *Potomac Electric Power Co.* v. *Penn Central Trans. Co. et al.*

[39] *Id.*, Order dated April 1, 1977.

[40] *Id.*, Order dated October 21, 1977.

[41] No. 77-2497, *Baltimore & Ohio Railroad Co.* v. *United States and ICC.*

[42] No. 77-1494, *Potomac Electric Power Co.* v. *United States and ICC.*

[43] No. 36114, *Potomac Electric Power Co.* v. *Penn Central et al.* (Order dated November 9, 1978)

at this juncture it is not known whether PEPCO will be required by the ICC to begin anew the attack upon the Penn Central (now ConRail) unit train rates on coal that was the subject of its complaint in December, 1974. Of course, the ICC in its discretion *might*, if PEPCO ultimately prevails, award reparations on those shipments made since this tariff was first filed, all of which are within the statutory period of limitations. Experience would suggest, however, that a shipper's prospects of being made whole through reparations are exceedingly slim.

Theoretical remedies should properly be assessed in practical terms. The only real hope of a shipper to avoid payment of an unreasonably high rail rate is to persuade the ICC to suspend, or at least investigate, that rate under an order that provides for refund. If a shipper cannot obtain judicial review of an ICC order denying its request for suspension and/or investigation, the alternative complaint route is long, arduous and uncertain and even if a shipper should be so fortunate as to be awarded reparations, the railroads would have had the use of the shipper's money at a rate of interest substantially below the current cost of money [49 U.S.C. 10707 (d)].

It is interesting that the brief of the Solicitor General addresses the very type of proceeding that occasioned the several pending review proceedings of these *amici*, *i.e.* a railroad general rate increase. The Solicitor General's discussion of such proceedings, however, in juxtaposition to a shipper complaint proceeding, fails to recognize the inability of a shipper in a specific rate case to assail the general revenue need justification of the rate in issue. Thus, in this regard, the Solicitor General says on brief:

> "Although some courts have held the contrary, the United States and the Commission have contended that orders approving general revenue increases may be reviewed with respect to the issue they have finally decided—*i.e.*, whether the carriers' general revenue needs warrant the general revenue needs warrant the general increase. This Court has reserved decision on that question. See *SCRAP II*, *supra*, 422 U.S. at 317 n. 18 (citing cases). Cases in which the Commission declines to investigate proposed general revenue increases would present the question whether shippers can use a Section 13 investigation to present the general revenue issue for adjudication; if not, the Commission's failure to investigate should be immediately reviewable. See 5 U.S.C. 704. In our view nothing in Section 13 precludes a complainant from challenging not only the lawfulness of the increased rate as they pertain to particular commodities and routes but also the general revenue justification for the increase. The decision not to investigate would thus be reviewable only after a final decision on those matters." (Solicitor General Brief, p. 32).

It concedes that the ICC's failure to investigate should be immediately reviewable if a shipper cannot obtain adjudication of the general revenue issue within the framework of a specific complaint proceeding. The further conclusion that this adjudication is possible fails to recognize the fact that a shipper cannot obtain jurisdiction over the carriers participating in

the general revenue proceeding. If the shipper seeks to attack the level of a rate on a particular commodity from A to B involving a movement over three railroads, there is no way that he can name all railroads as parties defendant so as to raise an issue of revenue need predicated upon the entire railroad industry. Neither can a shipper, in a complaint proceeding, raise the issue of whether the railroads proved revenue need in a previous general rate increase proceeding.[44] It would be equally impossible to have a complaint based on the refusal of the Commission to consider environmental issues raised prior to granting the increase.[45] Neither can the shipper obtain the requisite discovery which would enable him to present evidence respecting this general issue. It necessarily follows that the only opportunity of a shipper to assail the justification of a general increase in rates is by means of a general investigation upon the filing of the tariff proposal. Should the ICC abuse its discretion and refuse to institute such an investigation, an aggrieved shipper, if precluded from seeking judicial review, would be deprived of any effective remedy.

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[44] See *Council of Forest Indus. of British Co.* v. *ICC*, 570 F.2d 1056, 1061, 1062 (7th Cir. 1978) which raises doubts as to the continued efficacy of *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C. 1969) (three judge court) and *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969) (three judge court); both *aff'd mem.* by equally divided Court, 400 U.S. 73 (1970).

[45] *Aberdeen & Rockfish R. Co.* v. *SCRAP* (SCRAP II), 422 U.S. 289 (1975).

V. The Inappropriateness Of Injunctive Relief In Particular Circumstances Should Not Be Made A Barrier To Review

Petitioner's arguments addressed to the alleged need for expedited action upon tariffs, the revenue needs of the railroads, or the inappropriateness of staying a rate proposal and depriving the proponents of revenues that cannot later be recouped have no relevance to the instant issue of reviewability. On the other hand, such arguments would be perfectly appropriate if protestants accompanied their plea for judicial review with a motion for interlocutory injunctive relief. The same principles would obviously be applicable to a requested temporary stay of an ICC no-suspend order as in any other proceeding where injunctive relief, *pendente lite*, is sought by the petitioner in conjunction with review of an administrative order.[47] The mere fact that injunctive relief is not appropriate has no bearing whatsoever on the issue of reviewability.

The ICC's separate powers to suspend and investigate a proposed rate are clearly related and undeniably stem from the same statutory provision. Differing factual situations, however, would make one or both of those powers more or less significant. To illustrate, it is entirely proper for a shipper protesting a proposed tariff to limit its request to investigate without concurrently seeking suspension. One of these *amici*, Arkansas Power & Light Company, recently did just that with respect to a proposed rail rate on coal which later became the subject of a complaint proceeding for

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[47] These principles are expressed in *Virginia Petroleum Jobbers Ass'n* v. *FTC*, 259 F.2d 921 (D.C. Cir. 1958).

the simple reason that even an excessive rate was better than no rate at all.

Where the ICC institutes an investigation, whether or not accompanied by suspension of the effective date of the tariff, no unique issue is presented with respect to reviewability. In this situation the pendency of the investigation would rule out judicial review until completion of that investigation under conventional rules of administrative finality. The only situation where judicial review accompanied by a request for interim injunctive relief can be conceived is where the protesting shippers seek both suspension and investigation and the ICC denies both requests. In this circumstance the aggrieved shipper, if it concludes to seek judicial review, may or may not elect to simultaneously seek a temporary stay of the ICC's order permitting the tariff to become effective. As earlier stated, if such a temporary stay is solicited, petitioners have suggested no basis for assuming that the courts would apply any different standards of equitable relief than in any other case in which a stay is sought. Manifestly, if on balance, the railroads, as they assert here on brief, would be injured more by a grant of the stay than the shipper by denial of the stay, the former should prevail; but clearly the powers of the courts to review orders of the ICC should not be confused with the corollary issue of entitlement to interim injunctive relief pending such review.

VI. Burden Of Proof Considerations Do Not Warrant Deferral Of Review

The Solicitor General has here taken both an unexpected and unusual position. That position is unexpect-

ed because it differs from that taken by the United States before the reviewing court. It also is unusual because it grants a right with one hand and removes that right with the other hand on the basis of an exaggerated interpretation of the legislative intent.

The Solicitor General agrees that an ICC no-investigate order is reviewable. It would defer that review until after a complaint proceeding has been progressed to conclusion and thus states that the Court below "was incorrect in holding that decision is immediately reviewable" (Solicitor General Brief, p. 14). Much of this analysis is based on a perceived congressional intent brought about by the shifting burden of proof (Solicitor General Brief, pp. 18-19).

The burden of proof is allocated by the Commission in the normal manner. This fundamental rule of procedure is reflected in the ICC's Rules of Practice. Rule 1100.72 provides in pertinent part:

> "In formal—complaint, application and investigation proceedings complainant, applicant and respondent respectively shall open and close at the hearing except at further hearing granted on petition, the petitioner requesting further hearing shall open and close; and except further that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent . . ."

It is submitted, therefore, that it is impossible to perceive a Congressional intent as to reviewability from the fact that the Act embodies the standard requirements that the moving party assume the burden of

going forward with the evidence and the burden of proof.

The fundamental objection to the position taken by the Solicitor General is one of practical denial of relief. The old maxim "justice delayed is justice denied" is here particularly appropriate. If a shipper must progress a complaint proceeding to a final conclusion before it can claim its right to judicial review of a proceeding ICC no-investigate order, that order will long since have been obscured by the passage of time. PEPCO's experience previously discussed, which is not at all atypical, would indicate that disposition of a shipper complaint proceeding, even one involving only a few railroads and a few rates, is a matter of several years. If there were to be subsequent judicial review of a preceding no-investigate order and the reviewing court were subsequently to remand, the record before the ICC would be so stale as to make it impossible for the shipper to effectively obtain relief. Indeed, with rate increases being imposed two or three times a year, the rate as to which investigation were earlier sought would have been changed six or eight times before review could be obtained under the thesis here espoused by the United States.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the Court should expressly recognize the Congressional purpose to afford judicial review of final orders of the Interstate Commerce Commission which declined to investigate proposed tariffs.

Respectfully submitted,

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STATUTORY APPENDIX

49 U.S.C. 10103 provides:

> The remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

49 U.S.C. 10324 provides:

> (a) Unless otherwise provided in this subtitle, the Interstate Commerce Commission may determine, within a reasonable time, when its actions, other than an action ordering the payment of money, take effect. However, an action of the Commission in a proceeding involving a motor carrier, a broker, a water carrier, or freight forwarder may not take effect for 30 days.
>
> (b) An action of the Commission remains in effect under its own terms or until superseded. The Commission may change, suspend, or set aside any such action on notice. Notice may be given in a manner determined by the Commission. A court of competent jurisdiction may suspend or set aside any such action.
>
> (c) An action of the Commission is enforceable unless—
>
> (1) application for rehearing, reargument, or reconsideration is made under section 10323 of this title before the effective date of the action; or
>
> (2) the Commission stays or postpones the action.

49 U.S.C. 10327 provides:

(a) Notwithstanding sections 10322, 10323, and 10324(c) of this title, this section applies to a matter before the Interstate Commerce Commission involving a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title. However, other sections of this subtitle related to action of the Commission in proceedings involving rail carriers supersede this section to the extent that they are inconsistent with the provisions of this section related to deadlines.

(b) A division, individual Commissioner, employee board, or employee delegated under section 10305 of this title to make an initial decision in a matter related to one of those rail carriers shall complete all evidentiary proceedings related to the matter by the 180th day after assignment of the matter. The initial decision shall be submitted to the Commission in writing. If evidence is submitted in writing or testimony is taken at a public hearing, the initial decision shall be submitted to the Commission in writing by the 120th day after completion of all evidentiary proceedings and shall include—

(1) specific findings of fact;

(2) specific and separate conclusions of law;

(3) an order; and

(4) justification of the finding of fact, conclusions of law, and order.

(c) The Commission, or a division designated by the Commission, may void the requirement of an

initial decision under subsection (b) of this section and may require the matter to be considered by the Commission or that division on finding that the matter involves a question of Commission policy, a new or novel issue of law, or an issue of general transportation importance, or that it is required for the timely execution of its functions.

(d) In a proceeding under this section, after the parties have had at least an opportunity to submit evidence in written form, the Commission shall give them an opportunity for briefs, written statements, or conferences of the parties. A conference of the parties must be chaired by a division, an individual Commissioner, an employee board, an employee delegated to act under section 10305 of this title, or an employee designated by the Commission.

(e) Copies of an initial decision under subsection (b) of this section shall be served on the interested parties. An initial decision becomes an action of the Commission on the 20th day after it is served on the interested parties unless—

(1) an interested party files an appeal during the 20-day period, or by the end of an additional period of not more than 20 days, if authorized by the Commission or division designated by the Commission; or

(2) the Commission stays or postpones the initial decision under subsection (g)(2) or (j) of this section within the period or additional period referred to in clause (1) of this subsection.

(f)(1) Before an initial decision becomes an action

of the Commission, the Commission, or a division or board designated by the Commission, may review the initial decision on its own initiative, and shall review an initial decision if an appeal is filed under subsection (e)(1) of this section. However, a board may not decide an appeal from an initial decision if the appeal may be further appealed to the Commission.

(2) An initial decision may be reviewed on the record on which it is based or by a further hearing. If an initial decision is reviewed, it shall be stayed pending final determination of the matter, and it is an action of the Commission only after the final determination is made. If an appeal is filed under subsection (e) (1) of this section, the final determination shall be made by the 180th day after the appeal is filed.

(3) Review of, or appeal from, an initial decision shall be conducted under section 557 of title 5. The Commission may prescribe rules limiting and defining the issues and pleadings on review under section 557 (b) of that title.

(g)(1) The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

(A) reopen a proceeding;

(B) grant rehearing, reargument, or reconsideration of an action of the Commission; and

(C) change an action of the Commission.

An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.

(2) The Commission may grant a rehearing, reargument, or reconsideration of an action of the Commission that was taken by a division designated by the Commission if it finds that—

(A) the action involves a matter of general transportation importance; or

(B) the action would be affected materially because of clear and convincing new evidence or changed circumstances.

An interested party may petition for rehearing, reargument, or reconsideration of an action of the Commission under this paragraph under regulations of the Commission. The Commission may stay an action pending a final determination under this paragraph. The Commission shall complete reconsideration and take final action by the 120th day after the petition is granted.

(h) An action of the Commission under this section and an action of a designated division under subsection (c) of this section is effective on the 30th day after service on the parties to the proceeding unless the Commission provides for it to become effective on an earlier date.

(i) Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

(j) The Commission may extend a time period established by this section for a period of not more than 90 days. The extension shall be granted if a

majority of the Commissioners agree to it by public vote. The Commission shall send a written annual report to each House of Congress about extensions granted under this subsection. The report shall specify each extension granted (classified by the type of proceeding involved) together with the reasons for and duration of each extension.

(k) If an extension granted under subsection (j) of this section is not sufficient to allow for completion of necessary proceedings, the Commission may grant a further extension in an extraordinary situation if—

(1) at least 7 Commissioners agree to the further extension by public vote; and

(2) not later than the 15th day before expiration of the extension granted under subsection (j) of this section, the Commission submits a written report to the Congress that a further extension has been granted. The report shall include—

(A) a full explanation of the reasons for the further extension;

(B) the anticipated duration of the further extension;

(C) the issues involved in the matter before the Commission; and

(D) the names of personnel of the Commission working on the matter.

49 U.S.C. 10704 provides:

(a)(1) When the Interstate Commerce Commis-

sion, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

49 U.S.C. 10707 provides:

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b)(1) The Commission must complete a proceeding under this section and make its final decision by

the end of the 7th month after the rate, classification, rule, or practice was to become effective. However, if the Commission reports to Congress by the end of the 7th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that period; or

(B) if already in effect at the end of the time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice for 7 months after the time it would otherwise go into effect or, if a report is made under subsection (b) of this section, for 10 months after the time it would otherwise go into effect. However, the Commission may suspend a rate under this subsection only if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by by the complainant; and

(B) it is likely that the complainant will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1) (A) and (B) of this subsection.

(d) If the Commission does not suspend a proposed rate increase that is the subject of a proceeding under this section, the Commission shall require the rail carriers involved to account for all amounts received under the increase until the Commission completes the proceeding or until 7 months after the increase becomes effective, whichever occurs first, or, if the proceeding is extended under subsection (b) of this section, until the Commission completes the proceeding or until 10 months after the increase becomes effective, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the proposed increase is filed) of marketable securities of the United States Government having a duration of 90 days. When any part of a proposed rate decrease is suspended and later found to comply with this subtitle, the rail carrier may refund any part of the portion of the decrease found to comply with this subtitle if the carrier makes the refund available equally to the shippers who participate in the rate according to the relative amounts of traffic shipped at that rate.

(c) In a proceeding under this section, the burden

is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall specifically consider proof that the proposed rate, classification, rule, or practice will have a significantly adverse effect (in violation of section 10701, 10741-10744, or 11103 of this title) on the competitive posture of shippers or consignees affected by the proposed rate, classification, rule, or practice. The Commission shall give proceedings under this section preference over all other proceedings relating to rail carriers pending before it and make its decision at the earliest practical time.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then

determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

49 U.S.C. 13(1) provides:

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of

law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such a manner and by such means as it shall deem proper.

49 U.S.C. 15(6) provides:

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency

with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

49 U.S.C. 15(8) provides:

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be

the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

49 U.S.C. 17(9) provides:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

49 U.S.C. 22(1) provides:

(1) That nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat,

or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this part shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this part shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this part shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from

one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; nothing in this part shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose, or from carrying a disabled person accompanied by an attendant if such person is disabled to the extent of requiring such attendant, at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided*, That no pending litigation shall in any way be affected by this part: *Provided further*, That nothing in this part shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this part, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common

carriers are required to do with regard to other joint rates by section six of this part; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charges filed with the Commission in force at the time. The provisions of section ten of this part shall apply to any violation of the requirements of this proviso. Nothing in this part shall prevent any carrier or carriers subject to this part from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided*, That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or

any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this part shall be deemed to have violated the provisions of such part with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates.

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